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April 26, 1994

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Reply Comments of the Office of the
Commissioner of Baseball
Inquiry into Sports Programming Migration
PP Docket No. 93-21

Dear Mr. Caton:

Please find attached on behalf of the Office of the Commissioner of Baseball an original and 11 copies of the Reply Comments of the Office of the Commissioner of Baseball filed in the above-referenced proceeding.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,



Bruce A. Henoch

Attachment

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
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)

Implementation of Section 26 of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)

Inquiry into Sports Programming)
Migration)
)

PP Docket No. 93-21

TO: The Commission

**REPLY COMMENTS OF
THE OFFICE OF THE
COMMISSIONER OF BASEBALL**

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April 26, 1994

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SUMMARY

Virtually all of the parties to this proceeding agree that there remains no need for implementing rules to govern sports telecasting. The lone dissenting view was expressed by the Association of Independent Television Stations ("INTV"), which mischaracterizes both the terms of Baseball's telecasting contract with ESPN and the reasons for shifts in the telecasting patterns of several teams. The fact remains that there are today far more baseball games available for over-the-air television than broadcasters are willing or able to carry.

INTV's claims about the Sunday night exclusivity provisions in the ESPN contract are inaccurate and misleading. The only prohibition on local over-the-air broadcasting occurs if ESPN makes a game available in a particular team's home territory; otherwise, teams are free to authorize local over-the-air or regional sports network telecasts of Sunday evening games. Further, with few exceptions, the only games played on Sunday evenings are those televised by ESPN.

With regard to Wednesday night telecasts, INTV ignores the fact that, notwithstanding the ESPN exclusivity, local broadcasters have far more games to choose from throughout the season than they have slots available to broadcast such games. The ESPN contract does not reduce the output of available baseball games; it

simply requires broadcasters to shift games to other evenings or to Wednesday afternoons. Prior to the advent of the first ESPN contract, an average of two-thirds of U.S. flagships were not even telecasting games on a particular Wednesday evening. The significant pro-consumer benefits of the ESPN deal outweigh any scheduling difficulties that broadcasters may experience.

Finally, INTV's "statistical analysis" fails to support the need for siphoning rules, and inaccurately portrays the telecasting patterns of several teams. As explained in Baseball's initial comments, the number of baseball telecasts presented by any broadcaster during a given year may be affected by a number of factors unrelated to the number of games shown on cable; these factors have been ignored in INTV's "analysis."

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TO: The Commission

REPLY COMMENTS OF
THE OFFICE OF THE
COMMISSIONER OF BASEBALL

The Office of the Commissioner of Baseball ("Baseball") submits the following reply comments in response to the Commission's Further Notice of Inquiry, FCC 94-65 (released March 11, 1994).

The parties to this proceeding generally agree that there is no need for any governmental regulation of sports telecasting. However, the Association of Independent Television Stations ("INTV") (on behalf of unnamed broadcasters which may or may not have any involvement in the telecasting of baseball) takes a different view. INTV alone urges the Commission to

adopt rules that (1) would invalidate Baseball's contract with ESPN; and (2) would impair the ability of individual baseball clubs to deal in the marketplace with both broadcasters and cable networks. For the reasons set forth below and in the earlier comments filed by Baseball, any such rules (which would impermissibly infringe First Amendment rights) are both unnecessary and inappropriate.

DISCUSSION

I. The ESPN Baseball Contract Is Consistent With The Public Interest

According to INTV, the contract between ESPN and Baseball is a "preclusive contract" "against public policy." INTV Comments at 43.¹ INTV's position is

¹ Section 26(c)(2) of the 1992 Cable Act defines a "preclusive contract" as one between a college athletic conference and a telecaster that prohibits a broadcaster from televising a local college game -- unless that game is carried on a live or delayed basis by a local cable system. Although the Cable Act refers solely to preclusive contracts involving college conferences, INTV argues that the Commission should expand its mandate in this proceeding to consider what INTV erroneously believes are "preclusive contracts" involving other sports.

It should be noted that the 1992 Cable Act does not invalidate collegiate football "preclusive contracts." Rather, it directs the Commission to analyze the extent to which such contracts have "artificially and unfairly restricted the supply" of college football broadcasts. 1992 Cable Act, Section 26(c)(1). As this suggests, it is not enough for INTV

[Footnote continued on next page]

based upon a mischaracterization of both the nature and the effect of the exclusivity afforded ESPN -- as well as a complete disregard of the pro-consumer benefits of the ESPN baseball contract.

A. Sunday Night Exclusivity

INTV leaves the misimpression that there are numerous Sunday evening games that may not be televised by anyone other than ESPN, claiming: ESPN has "blanket exclusivity. No other media entity, be it a television station or pay cable network may telecast a game on Sunday nights." INTV Comments at 7.

As INTV should know, ESPN does not have "blanket exclusivity" on Sunday nights. Nothing in the ESPN baseball contract prohibits any club from authorizing the telecast of its Sunday evening game by an over-the-air station (other than a superstation) or by a regional cable network -- unless ESPN makes that same game available within the club's home territory (which it may do only a very limited number of times each season).

Furthermore, with few exceptions, the only baseball game scheduled for Sunday evening is the game

[Footnote continued from previous page]
simply to characterize a contract as "preclusive." It also must demonstrate an "unfair and artificial" restriction on supply. As discussed below, INTV has failed to do so with respect to baseball.

that ESPN televises; virtually all of the remaining Sunday games are scheduled to start before 5:00 p.m. Eastern Time, when there are absolutely no restrictions imposed by the ESPN contract.² The exclusivity afforded ESPN thus has no appreciable effect on the broadcasting of Sunday baseball games.

The ESPN contract did not change the way Sunday games are presented by baseball. Prior to 1990 when ESPN began televising baseball, major league baseball clubs typically did not play on Sunday evenings. For example, of the approximately 340 games scheduled to be played on Sundays in 1989, only twelve games were scheduled to start after 5:00 p.m. Eastern Time -- six of which were Texas Rangers home games. Broadcasters, therefore, have not been deprived of any Sunday telecasting "rights" that they had prior to the ESPN contract.

² The principal exceptions involve the Texas Rangers and the Florida Marlins. Because of the heat in these southern locations, the Rangers and Marlins start certain of their Sunday home games in the evenings. In 1994 the Rangers will play five Sunday evening games that will not be televised by ESPN, and the Marlins will play seven such games. Some of these Sunday evening games will be broadcast on free television; others will be televised over regional sports networks. Only one of the twelve non-ESPN Sunday evening games will not be televised.

To the contrary, the ESPN contract has created an entirely new concept -- Sunday night baseball -- that is highly valued by fans across the country. As a result of that contract, millions of fans may receive very popular programming that would not otherwise exist.

B. Wednesday Night Exclusivity

INTV claims that "40 percent of the American public is automatically denied access to baseball on Wednesday nights, even though these games are being played." INTV Comments at 6. INTV also complains that the Wednesday night exclusivity does not apply to regional sports networks (id.) and that such exclusivity "cannot be compared to other types of exclusivity" in the industry. Id. at 8. Again, INTV distorts the facts.

First, notwithstanding Wednesday night exclusivity, local broadcasters have far more games to choose from throughout the season than they have slots available to broadcast such games. Indeed, as is apparent from the WGN/Cubs telecast schedule, a broadcaster may televise approximately 140 games without offending the exclusivity provisions of baseball's national rights agreements. Baseball is not aware of any broadcaster, other than WGN, that is "ready, willing

and able" (INTV Comments at 8) to present such a large number of baseball telecasts.³

Second, ESPN was selected by baseball in large measure because ESPN is the most widely available of all the national cable networks. Currently, over 63 million (or approximately two-thirds) of the nation's 94 million television households are receiving ESPN. All of these 63 million households will have access to two ESPN baseball telecasts every Wednesday night during the regular season, for a total of approximately 50 telecasts per year. This is a very popular pro-consumer viewing option that did not exist prior to the ESPN contract.

Obviously, the benefits of the ESPN baseball package are not an option for those consumers who do not have a subscription service available or who cannot otherwise subscribe. However, it is wrong to assume, as INTV apparently does, that ESPN's exclusivity deprives all of these households of Wednesday night baseball.

³ INTV contends that local stations are increasingly being "squeezed out of baseball coverage" because of the exclusivity being afforded national carriers. INTV Comments at 12. However, as Baseball previously explained, any reduced baseball coverage is frequently the product of local stations' increasing interest in televising non-baseball programming. Were the Commission to impose restrictions on the amount of network or barter programming that broadcasters might carry, those broadcasters would have additional opportunities to televise sports.

Indeed, in 1989 (the last year before the ESPN contract), an average of only one out of every three flagships televised a Wednesday evening game; stated otherwise, on any given Wednesday night during 1989, two-thirds of the U.S. flagships were not televising baseball. Furthermore, as explained in Baseball's earlier comments, many of the regional broadcast affiliates chose not to carry many of the flagship telecasts. Thus, many households across the country would not receive an over-the-air baseball telecast on a given Wednesday night regardless of whether ESPN was afforded exclusivity by Baseball.

There is no evidence that ESPN's Wednesday night exclusivity reduces output. It simply requires broadcasters to televise games on Wednesday afternoons (when approximately one-quarter of the games will be played in 1994) or other evenings. In any event, the viewing options afforded by ESPN's Wednesday night doubleheader -- a concept created by Baseball and ESPN to provide telecasts to 63 million households -- far outweigh any scheduling difficulties that broadcasters may experience.

Third, approximately 90 percent of the time, one or two regional sports networks will televise a

Wednesday night game that is not telecast by ESPN. Contrary to INTV's claims, there is nothing inappropriate about permitting regional sports networks to televise baseball on Wednesday evenings. Indeed, the definition of a "preclusive contract" in the 1992 Cable Act contemplates that baseball may permit regional sports networks (as well as ESPN) to televise games that are denied to broadcasters. See note 1 supra.

Fourth, Baseball has entered into contracts involving national "game-of-the-week" presentations for thirty years; these contracts have afforded the national rightsholder the type of exclusivity present in the ESPN contract. It is unrealistic to expect that ESPN would become a national provider of baseball telecasts without receiving such comparable treatment, which has become standard in the industry. The pro-consumer benefits of the ESPN contract would not be possible absent the exclusivity necessary to make the contract economically viable. This is amply demonstrated by ESPN's experience under its prior baseball contract. ESPN found that telecasting games on nights on which it did not have exclusive telecasting rights (Monday, Tuesday and Friday) was not economically viable. ESPN was effectively forced to "close shop" on these nights as a result of poor ratings.

The Commission itself has recognized the importance of program exclusivity when it reimposed syndicated exclusivity rules. See, e.g., Report and Order in GEN. Docket No. 87-24, 3 F.C.C.R. 5299 (1988). Contrary to INTV's claims, exclusivity is not afforded solely on a program-by-program basis. Rather, under the Commission's syndex rules, a local broadcaster may secure exclusivity for all the programs in a given series, even if it does not broadcast all of those programs; a superstation, which may reach only a portion of the nation's households, may prevent all broadcasters nationwide from airing all of the programs in a given series, regardless of whether it airs all of those programs. The exclusivity afforded ESPN is consistent with that which broadcasters may obtain under the Commission's syndex rules.

II. INTV's Assumptions And "Statistical Analysis" Do Not Support Adoption Of Siphoning Rules

The record in this proceeding is devoid of any evidence that particular broadcasters are being denied access to baseball games which they are "ready, willing and able" to televise. Certainly no broadcaster has provided the Commission with any such evidence; nor has INTV even identified any specific case. INTV thus asks the Commission to "assume" that there would be more

games on free television in the absence of cable. INTV Comments at 4.

Such an unsupported assumption does not provide a proper basis for imposing siphoning restrictions and infringing First Amendment rights. As Baseball previously explained, the number of baseball telecasts presented by any broadcaster during a given year may be affected by a number of factors that are frequently unrelated to the number of baseball cablecasts. One cannot properly assume that broadcasters and regional sports networks are in fact competing for the same games.

INTV's "statistical analysis" (INTV Comments at 13-18) also fails to support siphoning rules. That analysis effectively concedes that there is no evidence of migration in the majority of the baseball markets. With respect to the remaining markets, INTV again asks the Commission to assume that increases in baseball cablecasts caused corresponding decreases in baseball broadcasts. The error of INTV's theory is apparent when one considers the facts surrounding several of these markets.

For example, the Chicago White Sox have experienced the largest decline in free telecasts of any

baseball club between 1980 and 1993; they also have experienced a significant increase in their cablecasts. However, as discussed in Baseball's earlier comments, these changes were primarily the result of factors such as the commitment of Chicago stations to other programming (Fox programming and Chicago Cubs telecasts).

Likewise, the Cleveland Indians' flagship, WUAB, chose to carry fewer games. The team's poor performance during the 1980s led to continually decreasing ratings, which prompted the station to seek other, more highly-rated programming. The increased availability of syndicated programming provided a basis for WUAB's decreasing its inventory of Indians' telecasts.

INTV also misstates the reasons for the number of Florida Marlins games on free television. In fact, the Marlins entered into their flagship broadcast contract before their cable deal. WBFS was not willing to pay for the rights to more than 50 games; the cable package provides an outlet for games that would not otherwise have been telecast.

CONCLUSION

For the reasons set forth above and in Baseball's initial comments, anti-siphoning rules are unwarranted; the record demonstrates that Baseball continues to make available to free television far more games than broadcasters are willing or able to televise.

Respectfully submitted,

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